Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996

CC Docket No. 98-146

Comments of the Information Technology Association of America

Jonathan Jacob Nadler
Brian J. McHugh
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Box 407
Washington, D.C. 20044
(202) 626-6838

Counsel for the Information Technology Association of America

September 14, 1998

SUMMARY

The Commission's efforts to promote the deployment of advanced telecommunications capabilities should be guided by two policies. First, the Commission should promote the *competitive* deployment of advanced telecommunications capabilities by expanding policies designed to facilitate new entry into the local market. Second, the Commission should preserve the ability of subscribers to use local data transport facilities to access the information service provider ("ISP") of their choice.

Promote Competitive Deployment

The ILECs – which retain *defacto* monopoly control over the facilties that ISPs require to provide service – have uniformly failed to deploy broadband technology in the "last mile." The ILECs have frequently tried to shift to the Commission the blame for their failure to deploy advanced services, and have repeatedly demanded that the agency eliminate their regulatory obligations. Government regulation, however, has not prevented the ILECs from deploying advanced telecommunications services. Rather, in the absence of competition, the ILECs have had no incentive to do so. Indeed, the ILECs have a strong economic incentive *not* to invest in these technologies because they can provide customers with a low-cost alternative to the ILEC's frequently over-priced T-1 services.

The best way to facilitate deployment of advanced telecommunications services is to adopt, and vigorously enforce, a regulatory regime that promotes *competitive* entry into the local data transport market. As illustrated by a growing body of evidence, ILECs are more likely to offer advanced telecommunications services when confronted with the prospect of losing customers to a rival carrier that provides such services at cost-based rates.

In particular, ITAA urges the Commission to initiate a new proceeding to adapt the *Expanded Interconnection* regime to authorize the creation of a new category of local transport provider, to be known as Data Competitive Access Providers (D-CAPs). Under this proposal, incumbent LECs would be required to hand-off aggregated data traffic that originates on a DSL-equipped loop to a D-CAP at the ILEC's central office. This approach would allow D-CAPs to provide advanced packet transport service to ISPs without having to provide DSL-based loops to end-users. By lowering the cost of entry, this approach would encourage companies to offer advanced telecommunications services. Moreover, by separating the provision of loop service from the provision of local packet transport, it would reduce the ability of the incumbent LECs to use their control over DSL-based loops to discriminate in favor of their information services affiliates and against non-affiliated ISPs.

Preserve ISP Choice

Without question, preserving the ability of consumers to select the ISP of their choice will serve the public interest. Experience in numerous other contexts has conclusively demonstrated that the ability of consumers to select from among multiple service providers creates incentives for providers to improve the quality of their services, provide consumers with expanded offerings, develop innovative new technologies, and offer services at lower prices.

The Commission, therefore, must continue to vigorously enforce regulations designed to prevent ILECs from using their monopoly power in the telecommunications market to impede competition in the information services market. In particular, ITAA strongly urges the Commission to apply its existing prohibition on bundling telecommunications and information services to the ILEC's provision of advanced telecommunications services. For

example, the Commission should not allow an ILEC to provide xDSL service only to customers that agree to use the carrier's Internet access service. The Commission also should prohibit the ILECs from making "special discounts" on xDSL service available only to customers that also purchase Internet access services from the carrier. The Commission should not allow the ILECs to evade the no-bundling requirement by providing advanced services through a separate affiliate.

TABLE OF CONTENTS

SUMMARY i

I. THE COMMISSION'S POLICIES SHOULD PROMOTE THE COMPETITIVE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS SERVICES 3

A. Promoting Competition, Rather Than Eliminating the Regulatory Obligations Of Incumbent Monopolists, Will Best Spur Deployment of Advanced Telecommunications Services 3

B. The Commission Can Further Spur Competition by Adopting ITAA's D-CAP Proposal 7

II. THE COMMISSION'S POLICIES MUST PRESERVE THE ABILITY OF USERS TO ACCESS THE INFORMATION SERVICE PROVIDER OF THEIR CHOICE 11

CONCLUSION 14

CHART: D – CAP Transport of ILEC-Originated DSL Traffic

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996	CC Docket No. 98-146

Comments of the Information Technology Association of America

The Information Technology Association of America ("ITAA") submits these comments in response to the Commission's Notice of Inquiry concerning the deployment of advanced telecommunications services.[1]

INTRODUCTION

ITAA is the principal trade association of the information technology industry. Together with its twenty affiliated regional technology councils, ITAA represents more than 11,000 companies located throughout the United States. ITAA's members provide the public

[1] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, FCC 98-187, CC Docket No. 98-146 (rel. Aug. 7, 1998) ("*Notice*").

with a wide variety of information products, software, and services. Among the most significant of these offerings are Internet access and other on-line information services.

Historically, information service providers ("ISPs") have had to rely on conventional circuit-switched telecommunications services provided by the monopoly incumbent local exchange carriers ("ILECs"). As the Commission has recognized, these facilities – which were designed for voice traffic – are ill-suited to accommodate the rapid growth in data traffic caused by the increasing use of the Internet and other information services.[2] As an association of ISPs, ITAA is pleased that the Commission has initiated this proceeding to determine the best method to promote the deployment of advanced telecommunications capabilities[3] – such as Digital Subscriber Line ("xDSL") and local packet networks – that can facilitate high-speed access to information services.

ITAA believes that the Commission's efforts to achieve this goal should be guided by two policies. First, the Commission should promote the *competitive* deployment of

---

[2] *See Notice* ¶ 19.

[3] In the *Notice,* the Commission seeks comment regarding the definition of "advanced telecommunications services" or "advanced telecommunications capability." *See Notice* ¶¶ 13-17. In particular, the Commission asks whether "push technologies" (*i.e.* services that allow users to subscribe to information that is periodically updated) and World Wide Web content hosting fall within the definition. *Id.* ¶¶ 13-17. These offerings plainly do not constitute advanced telecommunications services.

In a companion proceeding, the Commission has just concluded that advanced telecommunications service are *telecommunications* services. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 98-188, CC Docket No. 98-147, at ¶ 35 (rel. Aug. 7, 1998). Neither "push services" nor web content hosting services fall within the statutory definition of a "telecommunications" service because they do not provide "transmission, between and among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). To the contrary, these services fit squarely within the definition of an "information" service because they *use* telecommunications to provide the subscriber with the ability to "acquir[e]" information from a service provider. *Id.* at § 153(20).

advanced telecommunications capabilities by expanding policies designed to facilitate new entry into the local market. As part of this effort, the Commission should initiate a new proceeding to consider the proposal advanced by ITAA in its *Computer III Further Remand* comments to establish a new category of telecommunications provider – Data Competitive Access Providers or "D-CAPs." Second, the Commission should preserve the ability of subscribers to use local data transport facilities to access the information service provider of their choice. In particular, the Commission should preserve its No-Bundling Rule, which requires incumbent LECs to separate the provision of telecommunications and information services.

I. THE COMMISSION'S POLICIES SHOULD PROMOTE THE *COMPETITIVE* DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS SERVICES

A. Promoting Competition, Rather Than Eliminating the Regulatory Obligations of Incumbent Monopolists, Will Best Spur Deployment of Advanced Telecommunications Services

In the *Notice,* the Commission asks whether the current deployment of advanced telecommunications services is adequate.[4] In particular, the *Notice* seeks comment on whether such capacity has been adequately deployed in the "last mile,"[5] and whether there is a shortage of Internet backbone capacity.[6] The *Notice* further inquires as to the cause of any shortage, such as "barriers created by government regulation,"[7] and seeks specific proposals to spur deployment.

---

[4] *See Notice* ¶¶ 59-65.

[5] *Id.* at ¶¶ 19-24.

[6] *See id.* at ¶¶ 25 & 33.

[7] *Id.* at ¶¶ 66-68.

As the *Notice* recognizes, any effort to develop appropriate regulatory policies must begin with a clear understanding of the current state of the market.[8] While other commenters will likely provide greater detail, ITAA believes that two fundamental facts are clear. First, contrary to assertions made by some of the Bell Operating Companies ("BOCs"), there is no shortage of Internet backbone facilities.[9] Rather, competitive market forces have resulted in the deployment of massive, and ever-increasing, Internet backbone capacity.[10] Just recently, for example, AT&T announced a network upgrade that will quadruple the capacity on its Internet backbone and Sprint is implementing an upgrade that will increase its bandwidth by as much as 400 percent.[11]

The critical shortage of bandwidth that threatens to prevent millions of Americans from realizing the full promise of the Internet and other advanced services is in the "last mile," where the ILECs – which retain *de facto* monopoly control in most markets – have uniformly failed to deploy broadband technology. For example, during the last two decades the ILECs have failed to make ISDN service widely available at cost-based prices. Similarly, they have only just begun to deploy DSL services. And, even where the ILECs have done so, they typically have failed to price DSL services at a level that would make the service attractive to a

---

[8] *See id.* at ¶ 18.

[9] *See id.* at ¶ 25.

[10] *See* Kevin Werbach, Office of Plans and Policy, Federal Communications Commission, "Digital Tornado: The Internet and Telecommunications Policy," at 24 & n.45 (Mar. 1997) ("[T]he backbone circuits of the Internet are now being upgraded to OC-12 (622 Mbps) speeds, with far greater speeds on the horizon" and noting that "MCI ...plans to upgrade its backbone to OC-48 speed (2.5 Gbps) by 1988.").

[11] *See*, "*AT&T Begins Local Expansion After Teleport Merger,*" Communications Daily (July 27, 1998); "*Sprint Backs* Ciena *With Timing of OC-48 Rollout,*" ComputerWire, Inc. (Aug. 25, 1998).

significant portion of the population. As a result, a recent study concluded that there are only 5,000 DSL subscribers in the entire country.[12]

The ILECs have frequently tried to shift to the Commission the blame for their failure to deploy advanced services, and have repeatedly demanded that the agency eliminate their regulatory obligations. For example, for many years, the ILECs claimed that rate-of-return regulation deprived them of the incentives to deploy new services. When the Commission replaced rate-of-return regulation with the price cap system, the agency thought that it had created the needed incentives.[13] The ILECs, however, did not respond by measurably increasing the deployment of new services.

Last year, in the *Access Charge* proceeding, several of the ILECs attempted to blame their failure to deploy advanced telecommunications services on the Commission's policy of allowing ISPs (like other business users) to purchase State-tariffed business lines, rather than having to pay above-cost carrier access charges. The ILECs claimed that ISPs would not purchase new data-oriented network services if the Commission allowed them to continue to purchase State-tariffed services. In effect, the carriers demanded that the Commission provide them with a "captive audience" by depriving ISPs of the right to buy State-tariffed business lines

---

[12] *See Merrill Lynch, Wireline Communications Equipment: Trends in xDSL Deployment, at* 1 (June 22, 1998).

[13] *See Price Cap Performance Review for Local Exchange Carriers,* 9 FCC Rcd 1687, 1692 (1994) ("[B]y replicating many of the effects of competition," the Commission's price cap rules seek to "encourage the LECs to modernize their networks, deploy new technologies, and offer new services."); *Price Cap Performance Review for Local Exchange Carriers,* 10 FCC Rcd 8961, 9142 (1995) (The Commission's price cap rules for new services are intended "to provide the LECs with the flexibility to price efficiently and the incentive to innovate.").

before the carriers would accept the risk of investing in new broadband services. The Commission wisely rejected this argument.[14]

More recently, several of the ILECs petitioned the Commission to "forbear" from applying basic regulatory requirements – including the network unbundling and resale requirements designed to facilitate competitive entry into the local telecommunications market – to their provision of broadband telecommunications services.[15] The carriers once again trotted out their well-worn claim that wholesale deregulation is necessary to provide incentives to deploy advanced telecommunications services. The Commission declined the carriers' invitation to gut the pro-competitive regime adopted by Congress.[16]

The real reason that the ILECs have not yet deployed advanced telecommunications services is simple. In the absence of competition, they have had no incentive to do so. To the contrary, the ILECs have a strong economic incentive *not* to invest in these technologies. For many years, ILECs have met the needs of large business customers for high-speed data transport service by providing them with T-1 lines that are customarily offered at

---

[14] *See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges,* 12 FCC Rcd 15982, 16133 (1997). ITAA was pleased to join with the Commission in its successful defense of this order before the Eighth Circuit. *See Southwestern Bell Tel. Co. v. FCC*, No. 97-2618 (8th Cir. Aug. 19, 1998).

[15] *See Petition of Bell Atlantic for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-11 (filed Jan. 26, 1998); *Petition of U S West for Relief from Barriers to Deployment of Advanced Telecommunications Services,* CC Docket No. 98-26 (filed Feb. 25, 1998); *Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capabilities,* CC Docket No. 98-32 (filed March 5, 1998).

[16] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 98-147,* 98-11, 98-26, 98-32, 98-7, 98-91, CCB/CPD No. 98-15, FCC 98-188, at ¶ 32 (rel. Aug. 7, 1998).

rates substantially in excess of cost.[17] Promoting the use of advanced services like ISDN and DSL would provide these business customers with a low-cost alternative to T-1 facilities and, as a result, "cannibalize" the ILECs' lucrative T-1 business.

The best way to remove the ILECs' disincentive to deploy advanced telecommunications services is to introduce competition in the local data transport market. As illustrated by a growing body of evidence, ILECs are more likely to offer advanced telecommunications services when confronted with the prospect of losing customers to a rival carrier that provides such services at cost-based rates. For example, SBC did not make DSL service available in the San Francisco Bay area until May 1998 – six months after Covad Communications, a data-oriented CLEC, started offering DSL service in this market. Similarly, U S West first deployed its DSL service in Phoenix in June 1998 – seven months after Cox Cable introduced its high-speed cable modem service.[18]

The conclusion is clear. The best way to facilitate deployment of advanced telecommunications services is to adopt, and vigorously enforce, a regulatory regime that promotes competitive entry into the local data transport market.

B. The Commission Can Further Spur Competition by Adopting ITAA's D-CAP Proposal

In the *Notice*, the Commission has invited comment on how to spur the deployment of advanced telecommunications services through, among other things, "measures that promote

---

[17] *See Economics and Technology, Inc. The Effect of Internet Use on the Nation's Telephone Network*, at 15 (Jan. 22, 1997).

[18] *See* Merrill Lynch Study, *supra* n.12, at 2 & 4 (ILECs have deployed and priced xDSL services to "counter th[e] threat" from CLECs and cable systems).

competition in the local telecommunications market."[19] In its comments in the *Computer III Further Remand* proceeding, ITAA explained that the Commission can do so by modifying its rules to allow a new category of provider – which ITAA referred to as a Data Competitive Access Provider or D-CAP – to transport data between subscribers and their ISP.[20]

ITAA's proposal is based on the rules adopted in the Commission's *Expanded Interconnection* proceeding. There, the agency recognized that the obligation to provide "end-to-end" service can significantly deter competitive entry.[21] The Commission therefore required the incumbent LECs to unbundle the basic elements of their networks – loop, switching, and local transport – so that a CAP could provide only the segment requested by its customers. Under this approach, many CAPs provide the high capacity transport links between the incumbent LECs' central office and the points of presence of their customers' interexchange carrier.

ITAA urges the Commission to initiate a new proceeding to adapt the *Expanded Interconnection* regime to promote the development of advanced telecommunications services that can meet the broadband needs of ISPs and their customers. The Association believes that implementing this proposal would require only relatively minor changes to the Commission's existing regulations. Specifically, incumbent LECs would be required to hand-off aggregated data

---

[19] *Notice* ¶ 69.

[20] *See Comments of the Information Technology Association of America,* CC Docket No. 95-20, at 29, 30 (filed March 27, 1998). A chart illustrating the D-CAP proposal is attached.

[21] *See Expanded Interconnection with Local Telephone Company Facilities,* First Report and Order, 7 FCC Rcd 7369, 7373 (1992).

traffic that originates on a DSL-equipped loop to a D-CAP at the ILEC's central office.[22] The ILEC would be required to charge the D-CAP a cost-based interconnection rate that reflects its cost to: (1) strip off voice traffic (if required); (2) packetize and multiplex the data traffic onto the D-CAP's trunks so that the D-CAP can carry the traffic on its own high-capacity packet network; and (3) physically interconnect with the D-CAP. To deter discrimination, the incumbent LECs would be required to charge the same rate when it hands this traffic off to its information service affiliate.

This approach would allow D-CAPs to provide advanced packet transport service to ISPs without having to provide xDSL-based loops to end-users. By lowering the cost of entry, this approach would encourage companies to offer advanced telecommunications services. Moreover, by separating the provision of loop service from the provision of local packet transport, it would reduce the ability of the incumbent LECs to use their control over DSL-based loops to discriminate in favor of their information services affiliates and against non-affiliated ISPs.[23]

ITAA believes that the combination of CLECs and D-CAPs will be able to meet the needs of ISPs and subscribers in most markets. ITAA recognizes, however, that it may be a long time (if ever) before such competitive services are universally available. Consequently, ITAA

---

[22] Incumbent LECs are increasingly locating the main distribution frame at a remote terminal located between the subscriber's premises and the serving central office. In such cases, the Commission should require the ILEC to hand-off the aggregated data traffic at the remote terminal.

[23] The introduction of DSL and high-speed packet technology will create new opportunities for anticompetitive conduct by ILECs. In particular, an ILEC that provides DSL, and deploys Digital Subscriber Line Access Multiplexers ("DSLAMs") in each of its central offices, can route packetized data from each office to an ILEC data aggregation point where the data can then be handed off to individual ISPs. This configuration poses a risk of two types of anti-competitive conduct. First, the ILEC can use its control over the DSL-based loops to gain control of the local packetized data transport market (thereby rendering the ISPs' existing local data transport networks redundant). Second, the ILEC can design, deploy, and operate its data transport network in a manner that favors its affiliated ISP.

believes that the Commission's rules also should allow ISPs themselves to obtain aggregated data traffic from the incumbent LECs on the same terms as the D-CAPs.

The proposed regime is well within the Commission's legal authority. As the Eighth Circuit has recognized, traffic between ISPs and their subscribers is jurisdictionally mixed, and cannot feasibly be separated into inter-state and intra-state components.[24] Consequently, while the Commission has acted within its authority by allowing this traffic to be carried over State-tariffed business lines, the Commission could develop a parallel Federal regulatory regime applicable to traffic between a subscriber and an ISP that originates on a DSL-based loop. As the Commission's experience under both the *Expanded Interconnection* and UNE regimes demonstrates, such unbundling is both pro-competitive and technically feasible.

The ITAA D-CAP approach has generated significant attention, and warrants further consideration by the Commission. Indeed, NTIA has called on the Commission to use this Inquiry to "examine ways to promote greater customer choice for advanced services." In this regard, NTIA has specifically noted that:

> One approach that merits the Commission's attention would be to . . . [adopt rules that] allow carriers with DSL customers to interconnect with different carriers that provide local data transport service to ISP customers. Such rules could ensure that a subscriber's choice of DSL provider would not limit its choice of ISPs. They would also eliminate the need for an ISP targeting a particular geographic market to become a customer of every DSL carrier in that market. Instead, the ISP could make the best deal for local transport service and be assured of reaching all potential subscribers in a local market via interconnection with DSL service providers in that market. In this way, expanded interconnection rules could make a new

---

[24] *See Southwestern Bell Tel. Co. v. FCC*, No. 97-2618, at 41 (8TH Cir. Aug. 19, 1998).

generation of advanced service provides more attractive by increasing customers' choice of both ISPs and loop access service providers.[25]

II. THE COMMISSION'S POLICIES MUST PRESERVE THE ABILITY OF USERS TO ACCESS THE INFORMATION SERVICE PROVIDER OF THEIR CHOICE

In the *Notice*, the Commission has asked a number of critical questions regarding the ability of subscribers to use advanced telecommunications services and to access the ISP of their choice. As the Commission observes, the information services market is highly competitive – with more than 4,000 companies vying to provide Internet access service.[26] At the same time, "only a few providers of last miles [*i.e.*, local transport service] . . . have achieved mass acceptance."[27] In light of this situation, the Commission has inquired: whether the local transport providers have the ability and incentive to limit competition in the information services market; whether preserving "access by retail customers to thousands of ISPs [is] in the public interest";[28] and whether regulatory intervention is necessary to prevent "providers of last miles" from discriminating "in favor of their own ISP operations, to the detriment of consumers."[29]

---

[25] Letter from Hon. Larry Irving, Administrator, National Telecommunications and Information Administration, Department of Commerce to Hon. William E. Kennard, Chairman, Federal Communications Commission, at 8 (July 17, 1998); *see Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996*, at 12-14 (filed May 27, 1998) (FCC rules must allow interconnection to xDSL facilities).

[26] *See Notice* ¶ 37.

[27] *Id.* at ¶ 79.

[28] *Id.*

[29] *Id.*

Since the *First* Computer *Inquiry,* the Commission has recognized that the ILECs' monopoly control over local transmission facilities provides them with both the incentive and the ability to provide their information service affiliate with an unfair competitive advantage. An ILEC can do so in a number of ways. For example, an ILEC can:

- require customers to purchase both telecommunications and information services, or provide special discounts available only to customers that purchase both services;
- over-allocate joint costs to regulated telecommunications operations, or under-price goods or services that the ILEC's regulated telecommunications operation provides to its information service affiliate; or
- provide underlying telecommunications service to its information services affiliate and its customers that is superior in quality, and lower in cost, than the service that the carrier provides to non-affiliated ISPs and their customers.

Such anticompetitive conduct places non-affiliated ISPs at an insurmountable competitive disadvantage, thereby allowing the ILEC to leverage its telecommunications monopoly into the information service market. The end-result is to limit consumer choice.

Without question, preserving the ability of consumers to select the ISP of their choice will serve the public interest. Experience in numerous other contexts has conclusively demonstrated that allowing users to select from among multiple providers creates incentives for providers to improve the quality of their services, provide consumers with expanded offerings, develop innovative new technologies, and offer services at lower prices.

The Commission has repeatedly recognized competition is the most effective safeguard against anticompetitive conduct by incumbent monopolists.[30] Until such competition

[30] *See Market Entry and Regulation of Foreign-affiliated Entities*, 11 FCC Rcd 3873 (1995).

develops in the local telecommunications market, however, the Commission must continue to vigorously enforce regulations designed to prevent ILECs from using their monopoly power in the telecommunications market to impede competition in the information services market. These regulations include: the prohibition on bundling telecommunications and information services; the cost allocation and affiliate transaction rules; structural separation requirements; and the requirement that the ILECs deal with their information services affiliates in a non-discriminatory manner.

In particular, ITAA strongly urges the Commission to apply its existing prohibition on bundling telecommunications and information services to the ILEC's provision of advanced telecommunications services.[31] For example, the Commission should not allow an ILEC to provide xDSL service only to customers that agree to use the carrier's Internet access service. The Commission also should prohibit the ILECs from making "special discounts" on xDSL service available only to customers that also purchase Internet access services from the carrier.[32]

The Commission should not allow the ILECs to evade the no-bundling requirement by providing advanced services through a separate affiliate. Under the agency's *Computer II* rules, the no-bundling obligation applies to *all* carriers – both dominant and non-

[31] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)* Final Decision, 77 F.C.C.2d 384, 475 (1980) (subsequent history omitted) ("*Computer II Final Order*").

[32] Even in the absence of the No Bundling Rule, such conduct would constitute unlawful discrimination, in violation of Section 202 of the Communications Act. *See Competition in the Interexchange Marketplace*, 6 FCC Rcd 5880, 5911 (1991).

dominant.[33] This reflects the fact that the no-bundling rule does far more than prohibit conduct that would constitute unlawful "tying" under the antitrust laws. Rather, the Rule reflects the Commission's conclusion that, as a matter of communications policy, the public interest is best served by fostering the participation of a large number of providers in the information services market.[34]

CONCLUSION

Advances in digital technology have ushered in an exciting new generation of Internet and other information services. These services are already yielding substantial benefits to consumers, while enhancing the effectiveness and efficiency of government, schools, libraries, and healthcare institutions. In order for users to realize the full potential of the Internet and other information service offerings, however, reasonably priced advanced telecommunications services must be deployed on a widespread basis. The best way to facilitate such deployment is through the development of competition in the local data transport market – not by deregulating the

---

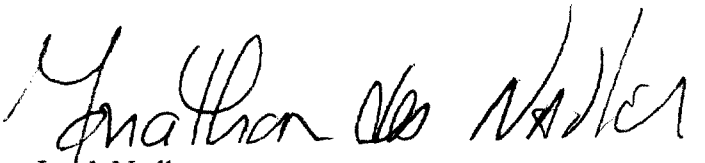
[33] *See Computer II Final Order* at 475. *Competition in the Interstate Interexchange* Market, FCC 95-2, CC Docket No. 90-132, at ¶ 40 (1995).

[34] The Commission's No-Bundling Rule also applies to customer premises equipment ("CPE"). *See* 47 C.F.R. § 64.702(e). The Commission has repeatedly recognized the pro-competitive benefits that the rule has provided in that market. *See NYNEX Tel. Cos., Tariff F.C.C. No.1, Transmittal No. 127*, 9 FCC Rcd 1608, 1608 (1994) (explaining that the competition generated by the no-bundling rule in the customer premises equipment market "has driven improvements in equipment quality, lowered CPE prices, and improved the performance of users' data communications networks."); *Verilink Corporation's Petition for Rulemaking to Amend the Commission's Part 68 Rules to Authorize Regulated Carriers to Provide Certain Line Build Out Functionality as Part of Regulated Network Equipment on Customer Premises*, 10 FCC Rcd 8914, 8921 (1995).

incumbent monopolists. Until such competition has taken root, the Commission's regulations must ensure that subscribers retain the ability to use carrier-provided advanced telecommunication services to access the ISP of their choice.

Respectfully submitted.

INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

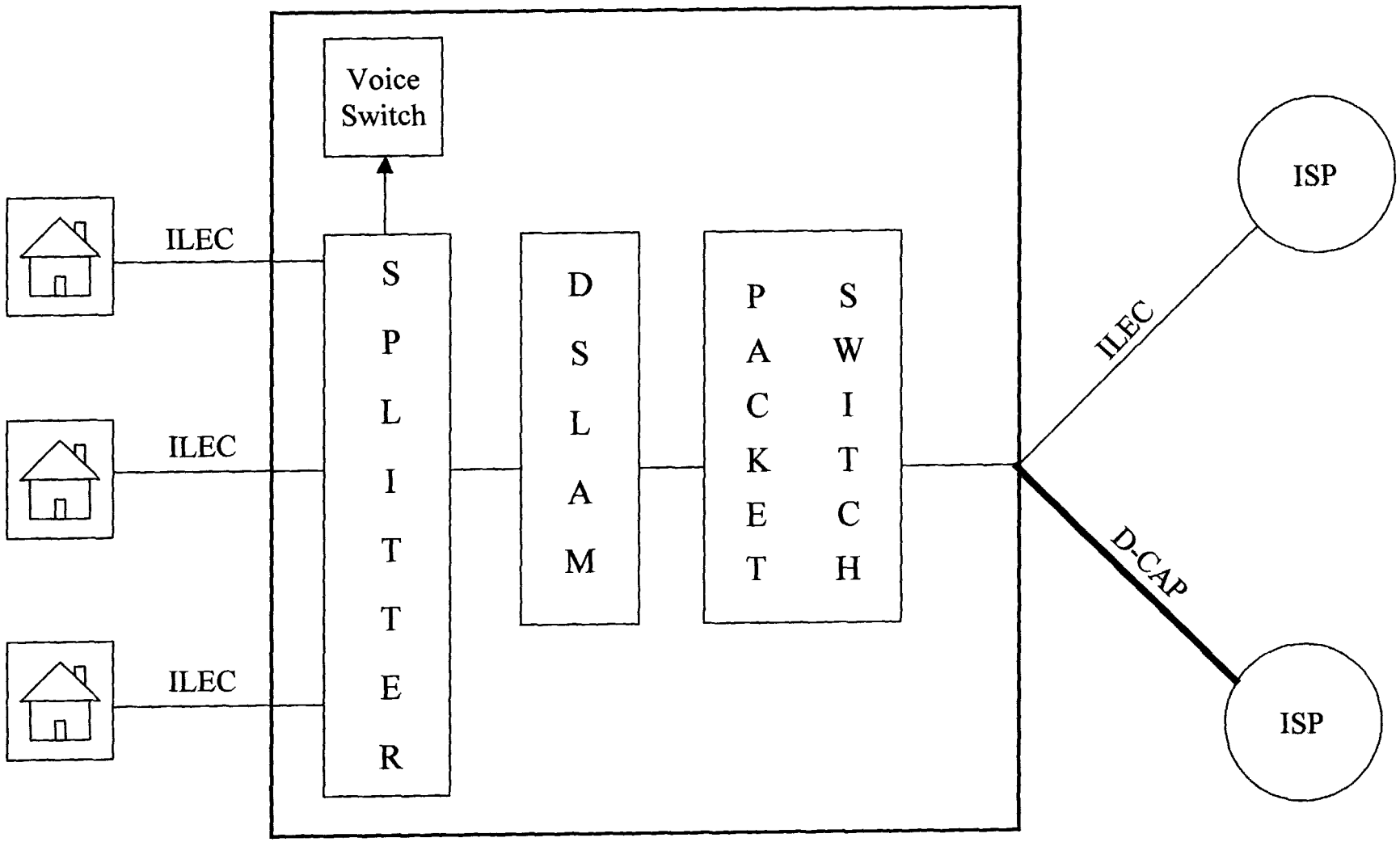
By: 

Jonathan Jacob Nadler
Brian J. McHugh
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Box 407
Washington, D.C. 20044
(202) 626-6838

Counsel for the Information
Technology Association of America

September 14, 1998

D-CAP Transport of ILEC-Originated DSL Traffic



Customer Premises (with DSL Modems)

ILEC Central Office

ISPs Premises